(3)

No. 04-79

SEP 15 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MARIA DEL ROSARIO ORTEGA, ET AL.,

Petitioners,

v.

STAR-KIST FOODS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MEMORANDUM IN OPPOSITION

Scott T. Rickman
Associate General Counsel
Del Monte Foods
One Market @ The Landmark
San Francisco, CA 94105
(412) 247-3265

Counsel of Record for Respondent

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding are Petitioners Maria Del Rosario Ortega, Sergio Blanco, and Patrizia Blanco-Ortega (plaintiffs in the courts below) and Respondent Star-Kist Foods, Inc. (defendant in the courts below). Plaintiff Beatriz Blanco-Ortega is not a petitioner before this Court. *See* Pet. 4 n.2.

At the time the district court action was initiated, Star-Kist Foods, Inc. was a wholly-owned subsidiary of the H.J. Heinz Company. During the course of the litigation, Star-Kist Foods, Inc. became a division of Del Monte Corporation, d/b/a Del Monte Foods, which in turn is a wholly-owned subsidiary of Del Monte Foods Company.

The facts of this case are "not normally the stuff of lawsuits in federal court." Pet. App. 1a. Beatriz Blanco-Ortega "cut her pinky finger while opening a can of Star-Kist tuna." *Id.* at 5a. The cut was "about a quarter of an inch deep, and about three-quarters of an inch long." *Id.* at 47a. A surgeon "successfully repaired" the damage. *Id.* at 5a. Today the finger "bears a small scar and is slightly bent." *Id.*

Beatriz, her parents, and her sister filed suit in federal court, asserting diversity jurisdiction under 28 U.S.C. § 1332. The district court dismissed the complaint for failure to satisfy the $75,000 amount-in-controversy requirement. *See* Pet. App. 3a. The court of appeals agreed as to Beatriz's parents and sister but was not convinced to a "legal certainty" that Beatriz will recover less than $75,000. Pet. App. 5a. The court of appeals held that the district court lacked jurisdiction to decide the claims of the other family members. Because Beatriz was allowed to proceed with her claims in federal court, she is not a petitioner before this Court. *See* Pet. 4 n.2.

REASONS WHY THE PETITION SHOULD BE DENIED

1. Both the court of appeals and Petitioners recognize that application of the supplemental jurisdiction statute, 28 U.S.C. § 1367, to parties who cannot satisfy the $75,000 amount-in-controversy requirement of 28 U.S.C. § 1332 arises in two different contexts: "ordinary joinder of additional plaintiffs under Fed. R. Civ. P. 20" and joinder of "absent class members in diversity-only class actions." Pet. App. 11a; *see also* Pet. 10 ("issue has arisen in two contexts"). Moreover, both the court of appeals and Petitioners recognize that the issue may not be resolved the same way in both contexts. *See* Pet. App. 32a n.19 (stating that "[t]he application of § 1367 to diversity-only class actions is a different problem for several reasons," and expressing "no view" on that issue); Pet. 9 ("the Court

might reach different conclusions applicable to the Rule 20 and class-action contexts"); *id.* at 17 n.13 ("courts have differed" as to whether result must be the same in both contexts).

Petitioners assert (Pet. 15) that there are "compelling reasons" to consider the "ordinary joinder" issue before considering the class action issue. In fact, there are strong reasons for doing exactly the opposite.

First, the circuit split on the "ordinary joinder" issue is not nearly as well-developed as the split over class actions. Only three circuits are involved in the "ordinary joinder" split, and only one agrees with Petitioners. *See Stromberg Metal Works, Inc. v. Press Mech., Inc.*, 77 F.3d 928 (7th Cir. 1996). Two circuits – the First in this case and the Third in *Meritcare, Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214 (3d Cir. 1999) – have gone the other way. Thus, contrary to Petitioners' assertion (Pet. 13) that the issue has been "fully joined and ventilated," 10 of 13 courts of appeals have not yet decided it. In contrast, the circuit split on the "class action" issue now involves nine circuits, with multiple circuits on each side. *See* Pet. App. 11a-12a; Pet. 11; *Olden v. Lafarge Corp.*, 2004 WL 1960157 (6th Cir. Sept. 7, 2004) (deciding class-action issue).

The "ordinary joinder" circuit split is not well-developed in other ways. *Stromberg*, the lone court of appeals decision supporting Petitioners, is eight years old, and in those years has not attracted support from any other court of appeals. Moreover, the Seventh Circuit expressly indicated that one reason for its decision in *Stromberg* was its "reluctan[ce] to create a conflict" with circuit cases deciding the class-action issue. *Stromberg*, 77 F.3d at 930. Depending upon how this Court decides the class action issue, the Seventh Circuit might well revisit the ordinary joinder issue. At a minimum, it would be appropriate to allow the numerous courts of

appeals that have not yet decided the issue an opportunity to consider the First Circuit's lengthy and thoughtful opinion in this case.

Second, this Court has previously granted review to consider the class action issue in *Free v. Abbott Labs.*, 529 U.S. 333 (2000). The Court is therefore familiar with the class action issue, and has no need to grant review in a case presenting a related but distinct issue as preparation for deciding an issue that has already been fully briefed and argued to the Court and vetted by nine courts of appeals.

Third, as Petitioners acknowledge (Pet. 15), the class action issue has received considerably more judicial attention than the ordinary joinder issue. Because the class action issue arises more frequently and involves more litigants, it is of greater practical importance and has a greater claim on the attention of this Court. The ordinary joinder issue, in contrast, has been decided by only three courts of appeals in 14 years.

Fourth, the ordinary joinder issue is not simple but "very difficult," Pet. App. 1a, as shown by Petitioners' own attempts to summarize their arguments. *See, e.g.*, Pet. 21-23 n.15 (attempting, in an extraordinarily long footnote, to discuss the removal statute, 28 U.S.C. § 1441). At one point, Petitioners assert that "no one has ever argued – nor could they"– that the presence of plaintiffs that fail to meet the amount-in-controversy requirement provides a basis for dismissing the entire action. Pet. 19-20. Petitioners contend that this is so because "courts routinely dismiss the claims only of the affected plaintiffs." Pet. 20 n.14. A few pages earlier, however, Petitioners state that "the addition of non-diverse plaintiffs . . . *does* leave the Court without jurisdiction," but this does *not* "foreclose a court from proceeding with the case by dismissing the non-diverse parties." Pet. 16 n.12 (citation omitted; emphasis added).

Indeed, the court of appeals concluded that "if § 1367 permits the permissive joinder of plaintiffs who cannot meet the amount-in-controversy requirement, then it also permits the joinder of non-diverse plaintiffs," thus "overturn[ing] nearly 200 years of case law interpreting § 1332 and authoriz[ing] a potentially huge expansion of the federal docket." Pet. App. 27a.

There is no reason for this Court to defer resolution of the class action issue on which it has previously granted certiorari in order to first resolve the less-developed and distinct ordinary joinder issue. If the Court were to grant review in *Allapattah Services, Inc. v. Exxon Corp.*, No. 04-70 (pet. for cert. filed July 14, 2004), or another case presenting the class action issue, it should follow its usual practice by allowing the lower courts to consider, in light of the Court's decision in one case, the proper disposition of related issues raised in other cases, particularly where the only court of appeals on one side of the split has indicated that it might go the other way depending on how the class-action issue is resolved. As the court of appeals noted, "this is an area where courts are wise to tread carefully." Pet. App. 12a.

3. Even if the Court wished to review the ordinary joinder issue, this case is not a good vehicle for deciding that question. *First*, the financial stakes are quite small. Both courts below concluded that it is a legal certainty that petitioners cannot recover $75,000 for their claims, and Respondent believes the actual value of the claims is much less. Because the value of Petitioners' claims is low, the parties lack an adequate financial incentive to litigate a preliminary jurisdictional issue in this Court.

Second, this case is atypical in that the plaintiffs are seeking to litigate personal injury claims in federal court, while the defendant seeks to litigate those claims in a court of Puerto Rico. More often, the plaintiff seeks to litigate in state court, while the defendant prefers a

federal forum. This reversal (which is probably explained by the fact that Puerto Rico does not provide a right to a jury trial in cases of this kind) could affect the parties' arguments before this Court, particularly in a case with low financial stakes.

Third, the court of appeals' holding that one of the plaintiffs meets the $75,000 amount-in-controversy requirement is questionable. The court of appeals held that it was "error" to consider multiple cases decided by the Puerto Rico Supreme Court holding, on similar facts, that plaintiffs are entitled to less than $75,000 in damages, primarily "because Puerto Rico does not have jury trials in civil cases." Pet. App. 4a. But if a jury were to award an amount of damages that the highest court of Puerto Rico would regard as excessive, a federal court sitting in diversity would be required to reduce the award. *See Gasperini v. Center for Humanities, Inc.* 518 U.S. 415 (1996).

* * *

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Scott T. Rickman
Associate General Counsel
Del Monte Foods
One Market @ The Landmark
San Francisco, CA 94105
(412) 247-3265

Counsel of Record for Respondent